

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Charging Party,

and

XPO CARTAGE, INC.,

Respondent.

**Case Nos. 21-CA-150873
 21-CA-164483
 21-CA-175414
 21-CA-192602**

**RESPONDENT XPO CARTAGE INC.'S ANSWERING BRIEF TO THE COUNSEL FOR
THE GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND ORDER**

Pursuant to Section 102.46 of the National Labor Relation Board's ("Board") Rules and Regulations, Respondent XPO Cartage, Inc. ("XPO") respectfully submits this Answering Brief to the Counsel for the General Counsel's ("GC") Limited Exceptions to the September 12, 2018 Decision and Order of Administrative Law Judge ("ALJ") Christine E. Dibble ("ALJD").

I. INTRODUCTION

The GC's exceptions fall into three categories: (1) attempting to bolster a weak finding in favor of the GC that the Owner-Operator drivers in this case are statutory employees, (2) overreaching to argue that two isolated and mundane statements having no impact on protected concerted activities were violations of the Act, and (3) arguing that XPO could not remove a

union supporter from service even where California Department of Motor Vehicle records showed that he was not qualified to drive.¹

II. ARGUMENT

A. The GC Relies on Irrelevant Minutia to Challenge Three Findings the ALJ Held Favored Independent Contractor Status

While the ALJ erroneously found in favor of the GC's contention that the Owner-Operator drivers are statutory employees, the GC excepts to her finding against employee status on three of the ten factors that she reviewed. But the GC's thin arguments only reveal the paucity of record evidence supporting his contentions.

1. Drivers Operate Without Supervision

The ALJ correctly found that Owner-Operator drivers operate without supervision from XPO and weighed that factor in favor of independent contractor status. The ALJ found that the drivers "are not supervised while driving and have discretion in choosing the delivery route" and XPO "does not dictate the drivers' work schedule, require the drivers to work a set number of hours, or control when the drivers choose to take a day off from working." ALJD p. 17. The ALJ also found that there was no agreement for close supervision and there was no evidence that the drivers receive evaluations, audits or training. *Id.* In short, the drivers come and go as they please, performing all of their work on the road, completely outside the purview of XPO.²

¹The GC also excepted to the ALJ's Order reference to "Stahl Specialty Company, Warrensburg, Missouri." While XPO excepts to the entry of any order in this matter as erroneous, XPO does not oppose the removal of any reference to Stahl Specialty Company in the Order.

²The GC's inapposite analogy to a chef, who typically would work within the employer's establishment, subject completely to the employer's constant oversight, hours of work, benefit plans, insurance, and workplace rules shows just how far the GC must overreach to make this argument.

In challenging these findings, the GC fails to address the ALJ's additional and detailed discussion of XPO's lack of control, based on driver testimony, including the testimony of the witnesses presented by the GC.

There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argued that in practice drivers were retaliated against for rejecting loads, I find otherwise. The ICOC specifically allows drivers to reject loads without suffering negative consequences from the exercising of this right. The drivers' rights to reject loads was not merely theoretical.

ALJD p. 15 (emphasis added and citations omitted). These findings completely and effectively refute the GC's argument.³

The GC offers nothing of substance to counter the drivers' "universal agreement" regarding their extensive discretion to work as they see fit. For example, the GC misleadingly states that XPO dispatcher Armando Rodriguez testified that drivers are in "constant contact with Respondent's dispatchers." But what Rodriguez actually testified was that dispatchers only check on deliveries when something goes wrong, *i.e.*, where the delivery is unexpectedly late. Rodriguez 1665. Checking on late deliveries is not indicative of supervision or control. A "company that pays for work by an independent contractor, like one that pays for work by an employee, has an understandable interest in ensuring the quality and value of the work being

³Of course, the GC is compelled to ignore these critical findings because it establishes what XPO has argued in support of its exceptions, that the control needed to find employee status is absent in this case. *See* Respondent XPO Cartage's Brief in Support of Exceptions to Administrative Law Judge Christine E. Dibble's Decision at 27.

performed.” *Menard Inc.*, 2017 WL 5564295 (N.L.R.B. Div. of Judges Nov. 17, 2017) (*citing N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989)).⁴

Beyond late deliveries, communication between XPO and the Owner-Operators is limited to conveying basic information inherent in any commercial relationship. Just like a court reporter must know what court room to attend or a tow truck operator must know where a disabled car is located, Owner-Operators must know what load to pick up and where to take it. Yet the GC attempts to cast conveying such basic information as something of substance. Nowhere is this more obvious than the GC’s attempt to use XPO’s SmoothCom application to suggest “constant contact” between XPO and the drivers. But SmoothCom is not a means of supervising the drivers by tracking their movements. ALJD p. 9. Rather, it merely automates the process of communicating necessary delivery information. Camacho 1126-29, 1135-36, 1202-03; Trauner 1977-81. If anything, by automating this process, SmoothCom, further reduces contact between XPO and the drivers.

Other “factors” relied upon by the GC similarly do not support the GC’s argument. For example, the GC takes exception to the fact that XPO will not contract with drivers who are prohibited from driving because they do not hold a valid driver’s license or registration, or have failed to obtain the federally required medical certification. It does not require much argument to understand that XPO is not obligated to enable such unlawful and dangerous behavior. Relatedly, the occasional notices advising drivers of regulatory requirements (GC Exh. 23) and

⁴Equally unavailing is the GC’s attempt to manufacture control from the fact that drivers’ shift start times are dictated by an individual shipper’s delivery times. GC Br. at 3. It is the GC who argues that shippers are customers, thus making their control irrelevant. The argument also completely ignores the 24/7 nature of the operations, meaning that delivery times are irrelevant as the volume of options means that there are deliveries for any time chosen by the driver. ALJD at 10.

customer delivery requirements (GC Exh. 24) simply do not prove an employment relationship. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) (“*FedEx I*”) (citing *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995)); *see also Central Transp., Inc.*, 299 N.L.R.B. 5, 13 (1990).

As for the drivers’ lack of involvement in obtaining or maintaining or contact with XPO’s customers, that is both a fundamental misconception and largely meaningless. XPO is the customer of the Owner-Operators – the shippers are XPO’s customers. And even if the shippers were the Owner-Operators’ customers, that fact hardly is determinative. *Arizona Republic*, 349 N.L.R.B. 1040, 1043 (2007); *Dial-a-Mattress Operating Corp.*, 326 N.L.R.B. 884, 893 (1998).

2. The Owner-Operators Are Skilled Drivers

The GC also takes exception to the ALJ’s finding that the Owner-Operators possess special skills. Given the contrary view of the Board and the Courts, that is a remarkable overreach.

[T]he question of whether the possession of a commercial driver’s license is a special skill is well-settled.

Luxama v. Ironbound Exp., Inc., 2013 WL 3286081, at *7 (D.N.J. June 27, 2013); *Green Fleet, Sys., LLC*, 2015 WL 1619964 (N.L.R.B. Div. of Judges Apr. 9, 2015) (finding drivers who held Class A licenses were specially skilled); *United States v. Ordonez*, 334 F. App’x 619, 624 (5th Cir.2009) (“We agree that possession of a CDL is a special skill.”); *United States v. Lewis*, 41 F.3d 1209, 1214 (7th Cir. 1994) (commercial truck drivers possess special skills).

In pressing this argument, the GC ignores exactly what it means to have a Class A license. Federal regulations require that the Drivers must have knowledge of and skills in twenty general areas, including “safe operations regulations,” “CMV safety control systems,” “backing,” “extreme driving conditions,” “hazard perceptions,” “emergency maneuvers,” “skid control and

recovery,” “relationship of cargo to vehicle control,” “vehicle inspections,” “hazardous materials,” “fatigue and awareness,” “air brakes,” and “combination vehicles.” 49 CFR §§ 383.111, 113. That drivers, who receive no training from XPO, pay for and attend driving school to obtain these skills further undermines the GC’s argument. Gaitan 715-716; Herrera 172; Montenegro 1476-77; Canales 755-56, Maleski 1879-80. The ALJ’s finding on this count is well-supported and not subject to any serious dispute.

3. Owner-Operator Drivers Provide the Critical Instrumentalities of Their Work

The evidence established, and the GC is forced to acknowledge, that the Owner-Operators owned the tractors that are the critical equipment that moves freight. Brief in Support of General Counsel’s Limited Exceptions (GC Br.) at 5; Camacho 1265, Maleski 1881. As the cases have reached the obvious conclusion that the tractor is the costliest and most important instrumentality of work to a truck driver, that should be the end of the analysis over whether the provision of instrumentalities, tools and place of work favors independent contractor status. *See Dial-a-Mattress Operating Corp.*, 326 N.L.R.B. at 892; *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 (2004).

The GC flails against this reality with essentially three points. The GC again relies on the wholly irrelevant federal mandate that XPO’s placard be placed in the truck when the Owner-Operator is hauling freight for XPO. 49 CFR § 390.21; Flores 1314-15; Maleski 1840-42, 1885-86. As discussed above, because this display is required by government regulations it cannot be evidence of employment status as a matter of law. *FedEx I*, 563 F.3d at 501; *see also Diamond L. Transp.*, 310 N.L.R.B. 630, 631 (1993).

Second, despite acknowledging that the Owner-Operators own the trucks, the GC argues that in the past, some Owner-Operators had leased their trucks. This argument presents a

distinction without a difference. Under applicable federal regulations, drivers who lease trucks are recognized as owners. *See* 49 CFR § 376.2 (defining “owner” as “A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person.”). At most, the type of leases at issue merely are another way to obtain an ownership interest in a vehicle, as demonstrated by the ultimate ownership of the trucks here. *See, e.g.,* Lopez 540-41, 598-99, 628-29; Herrera 47-48, 122, 166; Trauner 1955, 1965-66.⁵

Third, the GC claims that XPO owns or leases the container and chassis used to haul the goods. This is a claim at odds with the evidence presented at the hearing, which demonstrated that the trailing equipment was supplied instead by third parties, such as XPO’s customers or the railyards. Herrera 68-69; Avalos 2054-55, Montenegro 1497, GC Exh. 60 at Section 1(C). XPO no more owns this equipment, than it does the goods being hauled by the drivers. Trauner 1974-75. This reality flows from the limited nature of XPO’s operations – it does not itself physically move goods for its customers. Rather, it, performs logistics coordination between the Owner-Operator drivers, customers, ports, and railyards in Southern California. *See* Trauner 1930, 1937 GC Exh. 72 at XPO2462.

⁵The GC’s focus on XPO’s providing Owner-Operators an on-site repair option is misplaced because it does not change the fact that the Owner-Operators are completely financially responsible for the repair and maintenance of their trucks, and are free to get maintenance wherever they would like. Lopez 560; Camacho 1265; Flores 1311; Montenegro 1457, 1459-60; Decoud 1600.

B. The ALJ Appropriately Dismissed Three Unfair Labor Practices Relating to Domingo Avalos

What remains of the GC's exceptions is an attempt to revive three claims – two based on nothing more than a single, isolated workplace comment and a third based on testimony rejected by the ALJ as completely lacking in credibility.⁶

1. XPO Did Not Prevent Avalos from Talking About the Union

The GC argues that the ALJ should have found that XPO violated the Act when XPO dispatcher Armando Rodriguez stated that it was illegal to recruit for the Union. Avalos 319-25; *see also* Complaint, ¶ 7. The GC appears to recognize that the statement is not a violation of law because in a legal sleight of hand, the GC attempts to convert a statement prohibiting *recruiting* as a statement allegedly prohibiting *discussion*.⁷

Regardless of how the statement is characterized, the ALJ properly found that this isolated statement cannot constitute a violation of the Act. *See* ALJD p. 45 (citing *Avis Rent-A-Car System*, 280 N.L.R.B. 580 (1986)); *Shamrock Foods Co.*, 366 N.L.R.B. No. 117 at n.10 (June 22, 2018). Nothing in the record provides any basis for challenging the conclusion that this was a one-off statement, and the GC does not except to that finding. Further, no policy prohibiting written or verbal discussions of the union exists, something not challenged by the GC. ALJD p. 45.

The GC's generic attempt to cast *Avis* as an inapplicable case involving a representation proceeding actually confirms the ALJ's decision. Employer statements are subjected to greater

⁶The GC does not except to the ALJ's dismissal of the remaining allegations of the complaint. Under Rule 102.46(f), the GC's failure to except to these findings constitutes waiver of any challenge to these findings.

⁷Rodriguez denies that he made this statement, Rodriguez 1656-57, and the GC's own corroborating witness, Napoleon Gaitan, contradicted Avalos's story. Gaitan 705-06, 732-33.

scrutiny in representation proceedings. *See, e.g., Dal-Tex Optical Co., Inc.*, 137 N.L.R.B. 1782, 1786 (1962). Clearly, if a statement passes muster under the stricter representation case standard, then it without question cannot be an unfair labor practice. Equally inapposite is *Emergency One, Inc.*, which did not involve an isolated statement but an affirmative, company-wide prohibition on “union talk on company hours.” 306 N.L.R.B. 800, 802 (1992). *Magnolia Manor Nursing Home*, has even less application as it involved a company meeting to advise employees that they would be terminated for union talk or solicitation. 284 N.L.R.B. 825, 826 (1987). As the cases relied upon by the GC make clear, the one isolated statement here, carrying no threat, implicit or explicit, simply does not rise to the level of a violation.

In any event, the evidence does not support the GC’s argument that XPO prohibited discussion. Even the GC cannot avoid the fact that the challenged statement concerned only the legality of recruiting on company property. It is well-established that work time is for work, and that an employer lawfully may prohibit union recruiting during work time. *See Peyton Packing*, 49 N.L.R.B. 828, 843 (1943), *Essex International*, 211 N.L.R.B. 749, 750 (1974).

2. XPO Did Not Prohibit the Wearing of Union Insignia

The GC’s entire argument on union insignia is that XPO Recruiter Ezekial Chevez told Domingo Avalos that Avalos could not wear a union vest while he was on the Commerce yard. No dispute exists that Avalos did wear his vest onto the yard that same day and suffered no adverse consequences for doing so. In fact, Avalos admitted that that he wore the vest before the conversation, the day of the conversation, and every day thereafter. Avalos 449-50. Given these undisputed facts, and the absence of any official written or verbal rule prohibiting the wearing of union insignia, the ALJ necessarily found that XPO had not violated the Act.

The GC never effectively explains what he claims is the ALJ's error. While the GC argues that a lack of enforcement does not cure the initial coercion, the GC does not identify the alleged initial coercion on which his argument is premised. All that exists is a single statement, ignored by Avalos, with no ill-effects. As a matter of law, such a statement does not constitute a violation of the Act. *Shamrock Foods Co.*, 366 N.L.R.B. No. 117 at n.10.

The cases cited by the GC for the notion that a single incident in the absence of a written rule can be a violation all involve conduct not remotely comparable to that at issue here.

Sunnyside Home Care Project, Inc., involved not merely a statement, but rather a statement coupled with an explicit threat of discharge. 308 N.L.R.B. 346, 347 (1992). *Morton's IGA Foodliner*, similarly involved patently coercive conduct – a supervisor's interrogation of an employee seeking Union assistance in response to a claim of workplace harassment. 237 N.L.R.B. 667, 667 (1978). What the GC's arguments inadvertently do is bolster the ALJ's findings by demonstrating the substantially greater misconduct necessary to establish a violation of the Act.

3. XPO Lawfully Removed the Restricted Avalos from Service

The GC's final argument takes issue with the ALJ's conclusion that XPO did not retaliate against Avalos when it removed Avalos from service. Stripped to its core, what the GCs' argument does is to take issue with the ALJ's credibility findings.

The ALJ found that XPO removed Avalos from service because his license contained a restriction that prohibited him from driving. The GC's entire argument to the contrary is based on rank speculation (e.g., "why Avalos would have taken an action so counter to his own pecuniary interest") and an extended discussion of Avalos's rejected testimony. GC Br. at 18. As the ALJ explained in great detail regarding Avalos's lack of credibility:

Throughout the trial I found that Avalos lacked credibility. Especially on cross-examination, I found that the majority of his testimony was evasive and calculated to be misleading. He gave intentionally deceptive and often confusing testimony. An example is Avalos testified on direct examination that at the start of his lease, Chevez, Flores, and Banuelos told him that he could not drive for another company using his leased truck. He also testified that when the work was slow the drivers would ask if they could drive for another company, but the Respondent would deny the request. However, on cross-examination counsel for the Respondent pointed to his affidavit to the Board where Avalos stated, "If I wanted to work for another employer, I think that it would be fine, but it never happened." Even on the most minor of points, Avalos gave testimony that strained credulity. For example, he testified that when he drove for Alba, he was given a fuel card which provided a discount on fuel. Nonetheless, a mere few seconds later, he denied the card provided a discount on fuel then claimed he did not recall what he meant when he said it did provide a discount. Avalos finally settled on denying that the fuel card allowed him to buy gas cheaper even though all the other witnesses who were asked that question agreed that the fuel card provided a discount on gas. Likewise, he testified on direct examination that after Alba defaulted on his truck leases, the Respondent refused to allow him or Alba's other second seat drivers to work for other 30 drivers. He insisted that they had to wait until the Respondent offered them an opportunity to lease trucks that they could afford. However, on cross examination, Avalos grudgingly admitted, after being confronted with objective documentation, that he began leasing a truck directly from Pacer within 5 days of Alba defaulting on his truck leases. It is also notable that on direct examination Avalos could clearly remember almost every detail of events that had occurred 2 or more years prior. Inexplicably, Avalos could recall almost nothing about those same events when questioned on cross-examination.

ALJD at 33. In essence, what the GC seeks is a reversal of a well-founded credibility determination which Board law makes clear should not be disturbed. *See, e.g., Standard Drywall Prods.*, 91 N.L.R.B. 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *Renal Care of Buffalo, Inc.*, 347 N.L.R.B. 1284, 1288 (2006).

Even apart from this credibility determination, the ALJ's finding is supported by the evidence. GC Exhibit 41 is a document from the California Department of Motor Vehicles (DMV) showing that Avalos could not lawfully drive as of June 18, 2015 – the very date XPO removed Avalos from service. GC Exhibit 41 fully corroborated the testimony of XPO Safety Specialist Steve Casillas that Avalos presented Casillas with a temporary license listing the restriction, that Casillas informed Avalos of the problem and told Avalos to have DMV lift the restriction, and that Avalos acknowledged the problem. Casillas 1406-08. Given this document, the GC's ruminations and speculation regarding what may have happened or why Avalos or others might have taken such actions simply are irrelevant.

Avalos's license restriction also disposes of the claim that XPO discriminated against him because it eliminates any argument that Avalos could drive "but for" any allegedly unlawful action. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980). The GC attempts to create an issue where none exists by arguing that another DMV record called a "pull notice," GC Exhibit 78, showed that Avalos's license had no restrictions. The obvious problem the GC ignores is that the "pull notice" is irrelevant because it is dated June 16, 2015 – two days before XPO removed Avalos from service. GC Exhibit 41, also introduced by the GC, is the only document that demonstrates the status of Avalos's license on the date XPO removed him from service. In any event, even if the California Department of Motor Vehicles had made a mistake in recording the suspension on GC Exhibit 41, which it clearly did not, a decision based on a factual error simply does not constitute a violation of law. *See, e.g., Meyers Industries*, 268 N.L.R.B. 493, 497 n. 23 (1984).

GC Exhibit 41 similarly refutes the GC's remaining argument that the failure to find a discriminatory removal from service is inconsistent with the finding of XPO's animus in refusing a loan to Avalos. Generalized animus is not enough to find discrimination, such a finding

requires proof that the animus was the motivating factor in the challenged decision. *Wright Line*, 251 N.L.R.B. at 1089. The GC's conclusory contention regarding "[t]he timing of this action" simply is meaningless in light of GC Exhibit 41, which fully explains the timing and conclusively establishes the valid basis it presented for the removal of Avalos from service.⁸

III. CONCLUSION

For the above stated reasons as well as those set forth in Respondent's Brief in Support of Exceptions, the Board should reject the GC's exceptions.

Respectfully Submitted,

/s/ Joseph A. Turzi

Joseph A. Turzi
Jonathan Batten
DLA Piper LLP (US)
500 8th Street, NW
Washington, DC 20004

Counsel for Respondent XPO Cartage, Inc.

Dated: December 21, 2018

⁸Further undermining any allegation of animus is the undisputed fact that XPO immediately reinstated Avalos once he cured the problem. GC Br. at 12.

CERTIFICATE OF SERVICE

I hereby certify this 21st day of December, 2018, that a copy of the Respondent XPO Cartage's Answering Brief to the Counsel for the General Counsel's Limited Exceptions to the Administrative Law Judge Decision and Order was electronically served on the Region through the Board's electronic filing system, and also served on the following by email:

Mathew Sollet
Jean Libby
Counsel for the General Counsel
Region 21
National Labor Relations Board
12 N. Spring St., 10th Floor
Los Angeles, CA 90012
Mathew.Sollet@nrlrb.gov
Jean.Libby@nrlrb.gov

Amanda Lively
Wohlner Kaplon Cutler Halford & Rosenfeld
16501 Ventura Boulevard, Suite 304
Encino, CA 91436-2067
alively@wkclegal.com

Michael T. Manley, Attorney at Law
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001
mmanley@teamster.org

/s/ Jonathan Batten
An Employee of DLA Piper LLP (US)